SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

In the Matter of the Application of

LONG ISLAND ROLLER REBELS,

Petitioner,

v.

BRUCE BLAKEMAN, in his official capacity as NASSAU COUNTY EXECUTIVE, and COUNTY OF NASSAU,

Respondents,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules.

Index No. 604254/2024

REPLY MEMORANDUM OF LAW IN SUPPORT OF PETITIONER'S VERIFIED PETITION SEEKING A JUDGMENT PURSUANT TO ARTICLE 78 AND SEEKING A PRELIMINARY INJUNCTION

NEW YORK CIVIL LIBERTIES UNION FOUNDATION

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PRELIMINARY STATEMENT

In response to the Long Island Roller Rebels' petition and request for a preliminary injunction, Nassau County makes key concessions and fails to meaningfully dispute the legal and factual issues that are dispositive here. Most importantly, it fails to engage with the clear statutory language of the New York State Human Rights Law ("HRL") and Civil Rights Law ("CRL"), which explicitly prohibit discrimination on the basis of gender identity. Nassau County concedes that the Order categorically bars transgender women and girls from participating in women's and girls' sports at publicly-run facilities because of their transgender status. This categorical exclusion cannot be squared with the HRL and CRL's provisions prohibiting precisely such conduct, or with the agency guidance making clear that places of public accommodation cannot bar people from participating in sex-segregated activities, like sports, consistent with their gender identity. Nevertheless, Nassau County asks this Court to declare the Order "valid under State Law" (NYSCEF Doc No. 32 ["Nassau Br."] at 2). Nassau County's position—which is contradicted by statutes, regulations, guidance, and legal precedent—is untenable as it would allow local governments to impermissibly discriminate on the basis of gender identity.

Instead of directly addressing whether the Order facially violates state antidiscrimination laws by drawing distinctions on the basis of transgender status, Nassau County appears to misconstrue the relevant legal standard and offers "balancing test" constitutional defenses to an *equal protection* claim that the Roller Rebels did not make. In doing so, Nassau County concedes that the Order is facially discriminatory since, under equal protection jurisprudence, a defendant can justify facially discriminatory policies by showing that they further an important governmental objective. Because there is no balancing test under the *statutory* discrimination analysis applicable here, Nassau County's own arguments confirm that it has violated the law. On the other prongs of

the preliminary injunction analysis, Nassau County does not address, and therefore does not dispute, that without an injunction the Roller Rebels and countless other individuals will suffer irreparable harm, including the release of confidential medical information, outing, and a wide array of related unlawful discrimination, or that the balance of equities weighs overwhelmingly in favor of the injunction. Preliminary relief would maintain the status quo that has existed for many years, while Nassau County merely speculates about a hypothetical future harm without identifying a single example of harm (or even a complaint) arising out of the pre-Order status quo.

Accordingly, the Roller Rebels respectfully request that this Court enjoin Nassau County from enforcing the Order immediately.

ARGUMENT

I. THE ROLLER REBELS ARE ENTITLED TO THE REQUESTED PRELIMINARY INJUNCTION.

Nassau County's opposition to the Roller Rebels' request for a preliminary injunction is premised on a fundamentally erroneous view of the standards applicable to statutory antidiscrimination law claims. The Order facially violates the HRL and CRL by categorically barring transgender women and girls from participating in women's and girls' sports because of their transgender status. The Roller Rebels plainly meet the standard to obtain a preliminary injunction, particularly where they seek to preserve the longstanding status quo that the Order threatens to unlawfully upend.

Nassau County offers no meaningful support for its position that the Order is valid under state law and cites no cases concerning the participation of transgender people in sports. Instead, it relies almost entirely on two inapposite cases: an equal protection case denying access to same-sex marriage that has since been abrogated by the United States Supreme Court (*see* Nassau Br. at 5–7 [citing *Hernandez v Robles*, 7 NY3d 338 [2006], *abrogated by Obergefell v Hodges*, 576 US

644 [2015]]) and a nearly twenty-year-old case about restrooms that has since been abrogated by statute and intervening binding precedent (*see* Nassau Br. at 7–8 [citing *Hispanic Aids Forum v Estate of Bruno*, 16 AD3d 294 [1st Dept 2005]]; *see also* discussion *infra* 7–10). Every factor relevant to this Court's consideration of the requested injunction weighs strongly in favor of granting it, and Nassau County fails to present any arguments to the contrary.

A. Nassau County Concedes or Fails to Dispute the Key Issues that Decide this Case.

Nassau County concedes that the Order's entire effect and purpose is to bar transgender women and girls from participating in women's and girls' sports (*see* Nassau Br. at 8 [describing Order as restricting transgender women from "from participating in sporting events for biological women"]; *id.* at 6 [discussing danger of allowing "transgender females to compete against and with biological females"]). Yet Nassau County offers no plausible explanation for how a policy that facially discriminates on the basis of transgender status can be squared with state laws that prohibit such discrimination.

Nassau County does not dispute that the passage of the Gender Expression Non-Discrimination Act ("GENDA") in 2019 added explicit protections for transgender and gender-nonconforming New Yorkers to the HRL, the CRL, and the Education Law (Executive Law §§ 291–296; CRL § 40-c; Education Law § 313), and specifically defined "gender identity" to include "a person's actual or perceived gender-related identity . . . *regardless of the sex assigned to that person at birth*, including, but not limited to, the status of being transgender" (Executive Law § 292 [35] [emphasis added]). Nassau County entirely fails to address or engage with the forms of discrimination now prohibited by the plain text of the law post-GENDA. It also does not dispute—because it cannot—that the Order was issued against a backdrop of clear statutory protections, regulations, and guidance prohibiting discrimination on the basis of gender identity in public accommodations, like publicly-run athletic facilities, and in programs run by schools that use such

facilities. Nor does it dispute that prior to the issuance of the Order, participation in sports at public facilities in Nassau County had for years been governed by those same statewide laws without incident (*compare* Nassau Br. *with* NYSCEF Doc. No. 24 ["Petitioner's Br."] at 3–4, 9–14).

Nassau County also fails to dispute that under the plain text of the Order, the Roller Rebels' pending request for a permit to use county athletic facilities, and any other future request, must be denied since the Roller Rebels are a women's team with participation policies that explicitly welcome and include transgender women (*see* NYSCEF Doc. No. 1, petition at 13–16).

Because Nassau County does not offer any meaningful dispute on the key facts or issues that decide this case, the Roller Rebels are entitled to the requested relief.

B. Nassau County Fails to Rebut the Roller Rebels' Likelihood of Success on the Merits.

In response to the Roller Rebels' claims that the Order is facially unlawful under the HRL and CRL since it categorically bars transgender women and girls from participating in women's and girls' sports at publicly-run facilities because of their transgender status, Nassau County fails to engage with the statutory text, case law, regulations, and guidance that govern and resolve this case. Instead, it erroneously addresses a constitutional equal protection argument that the Roller Rebels did not make (*compare* Nassau Br. at 5–7 *with* petition at 16–17).

1. Nassau County Erroneously Relies on a Constitutional Equal Protection Standard Instead of the Applicable Statutory Standard.

Nassau County cites *Hernandez v Robles* (7 NY3d 338 [2006]), a case brought under the Equal Protection Clause of the New York State Constitution and involving no statutory claims, for the proposition that a policy that "discriminates based on gender identity and protection [sic]" must be "reviewed under an intermediate level of scrutiny—meaning that [it] will be sustained if 'substantially related to the achievement of an important governmental objective'" (Nassau Br. at

5).[1] But as the Court of Appeals has made clear in evaluating claims under the HRL,[2] "the test to be applied here is not the constitutional standard under the equal protection clause, but the statutory standard of the Human Rights Law" (*Union Free School Dist. No. 6 of Towns of Islip & Smithtown v New York State Human Rights Appeal Bd.*, 35 NY2d 371, 377–78 [1974]). This is particularly relevant because the HRL's protections extend *beyond* the Equal Protection Clause and "what the Constitution does not forbid may nonetheless be proscribed by statute" (*id.*; *see also Regan v City of Geneva*, 136 AD3d 1423, 1425 [4th Dept 2016] [holding that HRL discrimination claim succeeded where equal protection claim failed]). Indeed, by engaging in this equal protection analysis, Nassau County appears to concede that the Order discriminates against transgender women and girls, since "heightened scrutiny" would be triggered only by a threshold finding that its policy is facially discriminatory (*see Hernandez*, 7 NY3d at 364 [noting the "heightened scrutiny" balancing test would only be triggered by a policy that facially "discriminates on the basis of sex"]).[3]

In this case, where discrimination is statutorily *prohibited*, the Court does not need to

[1] Nassau County's citations to *United States v Virginia* (518 US 515, 533 [1996]), *Tuan Anh Nguyen v INS* (533 US 53, 70 [2001]), and *Ballard v United States* (329 US 187, 193 [1946]) (*see* Nassau Br. at 5–6) are inapposite because the Roller Rebels did not assert an equal protection claim.

[2] HRL and CRL discrimination claims are evaluated under the same standard (*see Gordon v PL Long Beach, LLC*, 74 AD3d 880, 885 [2d Dept 2010]).

[3] To be sure, case law confirms that the Roller Rebels would succeed on an equal protection claim if they had brought one—there was simply no reason to do so given GENDA's clear statutory protections. In jurisdictions without a GENDA-like statute, federal courts considering equal protection challenges to similar laws have found that such laws discriminate on the basis of transgender status in violation of the Equal Protection Clause (*see e.g. Hecox v. Little*, 79 F4th 1009, 1022–28 [9th Cir 2023] [holding law discriminated on the basis of transgender status, and was not "substantially related" to "an important governmental objective"]; *Doe v Horne*, 2023 WL 4661831, at *18–19 [D Ariz July 20, 2023] [granting preliminary injunction because law was not "substantially related to the legitimate goals of ensuring equal opportunities for girls to play sports and to prevent safety risks" and finding it "fails even under the rational basis test because it is not related to any important government interest"]). Nassau County cites no case to the contrary.

engage in a heightened scrutiny analysis because a finding of discrimination is independently sufficient to find that the Order violates the law (*see* Executive Law §§ 292[9], 296[2]; CRL § 40-c). Here, the Order violates the plain text of the law by discriminating on the basis of "the status of being transgender" (Executive Law § 292 [35]). It categorically bars only *transgender* women and *transgender* girls from participating in or having access to the women's and girls' activities that their cisgender peers have access to—solely on the basis of transgender status. Under this straightforward application of the statutory text, the Order cannot stand, and Nassau County fails to put forth any arguments to the contrary.

Nassau County also does not address the clear guidance from multiple state agencies confirming that it constitutes prohibited discrimination to bar transgender women and girls from participating in sex-segregated activities and programs consistent with their gender identity. Guidance from the Division of Human Rights provides a specific articulation of what prohibited discrimination looks like in the context of sex-segregated activities like sports: A "place of public accommodation . . . must permit a person to participate in [] sex-segregated services or programs consistent with their gender identity" (NYSCEF Doc. No. 17 ["DHR Guidance"] at 9; *see also* NYSCEF Doc. No. 18 ["NYSED Guidance"] at 8, 25 [Department of Education guidance stating that, in school-sponsored athletics, "students should be allowed to participate in a manner most consistent with their gender identity without penalty" and that prohibited "discrimination based on sex includes discrimination based on gender identity . . . with respect to admission into or inclusion in . . . athletic teams in public schools"]).

Rather than focus on the central question of whether the Order's categorical exclusion of transgender women and girls from women's and girls' sports violates state antidiscrimination law, Nassau County seeks to distract by defending the general separation of men's and women's

athletics (*see* Nassau Br. at 5–7). The general separation of teams for men and women is not at issue in this case, so Nassau County's reliance on *O'Connor v Board of Education* (449 US 1301 [1980])—which noted in passing that separating girls' and boys' sports teams is permissible—is misplaced. The Roller Rebels do not challenge the separation of women's and men's sports; rather they challenge Nassau County's rule singling out transgender women and girls for exclusion based on their transgender status.

2. Nassau County's Statutory Arguments Are Unavailing.

Nassau County's remaining contentions are without merit. First, it inexplicably suggests that this Court should defer to Nassau County's interpretation of state antidiscrimination law (Nassau Br. at 4). Nassau County concedes that "an agency's interpretation of the statutes and regulations that it is charged with administering will be upheld if the question before the court involves the agency's special competence or expertise" (Nassau Br. at 4 [citing *Matter of Held v. State of New York Workers' Compensation Bd.,* 42 Misc.3d 1216(A), *7 [Sup Ct, Albany County 2008]]), but it fails to acknowledge that the agency entitled to deference in this case is the Division of Human Rights, not Nassau County. Nassau County is not owed deference in its erroneous view of what state antidiscrimination laws require since it is not "charged with administering" those laws. The Division of Human Rights, by contrast, is (*see Eastport Assocs., Inc. v New York State Div. of Hum. Rts.*, 71 AD3d 890, 891 [2d Dept 2010] [noting Division of Human Rights determinations are accorded "considerable deference due to its expertise in evaluating discrimination claims"]; *see also Coffey v Joy*, 91 AD2d 923, 924 [1st Dept 1983] [internal quotation marks omitted], *aff'd at* 59 NY2d 643 [1983] [The "construction and interpretation of an administrative agency of the statute under which it functions . . . are entitled to the greatest weight by the courts"]).

The only precedent Nassau County relies on to argue that its classifications "based on

biological sex"[4] are nondiscriminatory under the HRL is *Hispanic Aids Forum v Estate of Bruno* (16 AD3d 294 [1st Dept 2005]), a nearly twenty-year-old First Department case that interpreted a prior version of the HRL that lacked explicit protections for "gender identity." *Hispanic Aids Forum*'s holding that transgender individuals could be prevented from using restrooms in accordance with their gender identity was abrogated in 2019 by the plain text of GENDA—which added an explicit prohibition on discrimination based on the "status of being transgender," specifically noting that this prohibition applies "regardless of the sex assigned to that person at birth" (Executive Law § 292[35])—and subsequent Division of Human Rights guidance, which makes clear that the discrimination found acceptable in *Hispanic Aids Forum* is considered unlawful discrimination under the amended HRL and CRL (*see* DHR Guidance at 3 ["Denying the use of restrooms or other facilities consistent with a person's gender identity" is unlawful discrimination on the basis of gender identity]).

Hispanic Aids Forum also cannot be squared with Second Department precedent that has made clear that misclassifying a transgender woman as "male" and denying her access to programs and activities for women is a form of prohibited discrimination under these laws. In *Advanced Recovery, Inc. v Fuller* (162 AD3d 659 [2d Dept 2018]), the Second Department affirmed a Division of Human Rights determination[5] finding that a transgender woman had been

[4] The Endocrine Society's clinical guidelines note that "the terms biological sex and biological male or female are imprecise and should be avoided" because the physiological aspects of a person's sex are not always aligned with each other (*see* NYSCEF Doc No. 3, Hembree WC, et al., *Endocrine treatment of gender-dysphoria/gender incongruent persons: An Endocrine Society clinical practice guideline*, Journal of Clinical Endocrinology, 102: 3869–3903, 3875 [2017], *available at* ps://academic.oup.com/jcem/article/102/11/3869/4157558).

[5] The full Division of Human Rights determination, which the Second Department affirmed, is available at *Fuller v Advanced Recovery, Inc.*, New York State Division of Human Rights Case No. 10144572, Notice and Final Order [Apr. 01, 2015], attached as Exhibit 21 to the affirmation of Gabriella Larios ("Larios Reply Affirmation"), *available at* https://dhr.ny.gov/system/files/documents/2022/05/fuller_v_advanced_recovery.pdf.

discriminated against on the basis of sex and disability under the HRL when her employment was terminated after she requested to be treated as a woman in all respects, including by being allowed full access to the women's restroom and to dress as a woman at work. To the extent that there is any conflict between *Fuller* and *Hispanic Aids Forum*, this Court must follow Second Department precedent (*see Maple Med., LLP v Scott*, 138 NYS3d 61, 68 [2d Dept 2020], *affd sub nom. Columbia Mem. Hosp. v Hinds*, 38 NY3d 253 [2022]).

Moreover, even within the First Department, courts have declined to extend *Hispanic Aids Forum* to other contexts involving sex-separated facilities and programming. (*See e.g. Wilson v Phoenix House*, 42 Misc 3d 677, 681 [Sup Ct, NY County 2013] [finding HRL violation where transgender woman was denied equal access to women's housing and programming after being classified as "biologically male"]; *Doe v City of New York*, 42 Misc3d 502, 507 [Sup Ct, NY County 2013] [finding HRL violation when city agency misclassified transgender woman as a "male" and treated her as such]). Nassau County entirely fails to engage with or distinguish these cases cited in the Roller Rebels' moving papers (*compare* Nassau Br. *with* Petitioner's Br. at 13–14).

Even if *Hispanic Aids Forum* had not been abrogated by GENDA and intervening case law, regulations, and guidance, Nassau County's reliance on it is also misplaced because the Order selectively excludes transgender women and girls, but not transgender men and boys, from participation in sports teams that align with their gender identity (*see* Petitioner's Br. at 14). In *Hispanic Aids Forum*, the court considered a policy that excluded *all* "biological males" and "biological females" from restrooms "on the same basis . . .their biological sexual assignment" (16 AD3d at 299) and specifically noted that the HRL might be triggered if the plaintiffs had alleged that "transgender individuals were selectively excluded" (*id*.). Here, Nassau County has not

created a rule that excludes all "biologically female" or "biologically male" individuals from participation in sports on the same basis—it selectively excludes transgender women and girls and is *not* "applied uniformly" to men and women (*id.*).

The parties agree that "a determination is affected by an error of law where the agency incorrectly interprets or improperly applies a statute, regulation, or rule . . . or where its determination violates some other statutory . . . provision." (Nassau Br. at 4 [quoting *Matter of Moscatelli v New York City Police Dept.,* 2022 NY Slip Op 34393[U], *7 [Sup Ct, NY County 2022]]). Here, Nassau County's determination in enacting and enforcing the Order was "affected by an error of law" (CPLR 7803 [2]) because the Order violates the statutory provisions of the HRL and CRL, which squarely prohibit discrimination on the basis of gender identity.[6] For all these reasons, the Roller Rebels are likely to succeed on the merits.

C. Nassau County Does Not Dispute Irreparable Injury or the Balance of Equities.

Nassau County does not address, and therefore does not dispute, the Roller Rebels' showing of irreparable injury, nor does it dispute that the balance of equities weighs in favor of the requested injunction. Nassau County's failure to meaningfully address these required prongs of the preliminary injunction analysis only serves to highlight why the injunction is appropriate.

Without an injunction, implementation and enforcement of the Order will subject the Roller Rebels and many others across Nassau County (and beyond) to the prospect of irreparable injury in the form of harmful discrimination and subjection to invasive inquiries about their personal anatomy and confidential medical history (*see* Petitioner's Br. at 15–18). For as long as the Order

[6] Because the Roller Rebels' argument that Nassau County's determination was "affected by an error of law" is straightforward, and the parties agree on the standard for evaluating that claim, the Roller Rebels withdraw their argument that the respondents are also "proceeding . . . in excess of jurisdiction" (*see* petition at 16–17; Nassau Br. at 3–4) and ask this Court to decide their preliminary injunction request on the "error of law" claim.

prohibits transgender women and girls from participating in women's and girls' sports, it imposes a severe dignitary harm that New York's antidiscrimination laws exist to prevent (*see Gifford v McCarthy*, 137 AD3d 30, 40 [3d Dept 2016]). Nassau County makes no effort to argue these harms are not real and irreparable.[7]

In attempting to minimize the harms of the Order's enforcement scheme, Nassau County contends that the Order "merely requires that a sporting organization disclose the biological sex of the organization's members" (Nassau Br. at 8). The Roller Rebels do not currently require or otherwise ask for such information about "biological sex" (*see* petition ¶ 57), so in order to comply with the Order, the Roller Rebels' cisgender and transgender members alike will be subjected to invasive inquiries about their anatomy and the sex they were assigned at birth, along with the prospect of being outed or otherwise having their confidential medical information revealed publicly if the Order requires that they be expelled from their team. Demanding or publicizing such details runs afoul of multiple state laws designed to maintain the confidentiality of a person's sex assigned at birth (*see e.g.* CRL §§ 67, 67-B [ordering records changing sex designation on birth certificate to be sealed]; Public Health Law §§ 4231, 4138[f] [same]; *see also Cody VV. v Brandi VV.*, 2024 NY Slip Op 00961 at *2 [3d Dept Feb. 22, 2024] [justifying presumptive sealing of sex designation on government records because "risk to one's safety is always present upon public disclosure of one's status as transgender"]).

Nassau County also does not dispute that the balance of equities weighs in favor of the Roller Rebels. In contrast to the numerous significant harms that the Roller Rebels face without

[7] To the extent that it makes any argument concerning these harms, Nassau County suggests that the Order merely imposes "a very limited restriction" (Nassau Br. at 8) by forcing transgender women and girls to participate in men's or co-ed teams. This is a significant harm because "[p]articipating in sports on teams that contradict one's gender identity 'is equivalent to gender identity conversion efforts, which every major medical association has found to be dangerous and unethical'" (*Doe v Horne*, 2023 WL 4661831, at *14 [quoting *Hecox*, 79 F4th at 1046 n 5]).

injunctive relief (*see* Petitioner's Br. at 15–19), Nassau County will suffer no harm at all if the Order is enjoined.[8] The requested injunction would simply maintain the status quo that existed for many years prior to the sudden issuance of the Order (*see* petition ¶ 43). The Order fully upends the status quo by imposing novel requirements that are both sweeping in scope and deeply confusing in nature—requiring all women's and girls' sporting organizations to immediately develop a process for both identifying and aggressively policing the sex designation that appeared on every participant's birth certificate at the time of her birth despite the myriad legal and ethical barriers to doing so. Pausing the system-wide imposition of these requirements on the Roller Rebels—and on the schools, teachers, coaches, organizers, and teammates across Nassau County who are all subject to the terms of the Order, even as they are also subject to binding antidiscrimination and confidentiality requirements that the Order violates—would avoid the widescale chaos that such enforcement would wreak on an otherwise stable status quo.

For all these reasons, the irreparable-harm and balancing-of-equities prongs of the preliminary injunction analysis weigh strongly in favor of the requested injunction.

[8] Indeed, in considering whether Nassau County itself could establish irreparable harm if the Attorney General took enforcement action against the Order, a federal court found that Nassau County failed to show any irreparable harm and could not establish that any "woman or girl would be physically injured or be excluded from recognition, accolades, or other long-term benefits from athletic activities by invalidation" of the Order (*Blakeman v James*, No. 24-cv-01655 [EDNY], ECF 22, Apr. 4, 2024 Opinion & Order at 43, Larios Reply Affirmation Exhibit 22). Additionally, it found no evidence that "invalidation of the Executive Order would compel [Nassau County] to violate the equal protection rights of women and girls . . . if [it] were to revert" to the permitting scheme in place prior to the Order's enactment (*id.* at 29).

CONCLUSION

For the foregoing reasons, this Court should grant the Roller Rebels' request for a preliminary injunction and enjoin Nassau County from implementing or enforcing the Order during the pendency of these proceedings.

Dated: April 9, 2024
New York, N.Y.

Respectfully Submitted,

NEW YORK CIVIL LIBERTIES UNION FOUNDATION

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CERTIFICATE OF COMPLIANCE WITH 22 NYCRR § 202.8-b

I hereby certify that:

This brief complies with the word count limitation of 22 NYCRR § 202.8-b because the total word count, according to the word count function of Microsoft Word, the word processing program used to prepare this document, of all printed text in the body of the brief, exclusive of the caption, table of contents, table of authorities and signature block, is 4,157.

Dated: April 9, 2024
New York, N.Y.

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